IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 814 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
AND
HON'BLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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HARESH @ HAKLO BACHUBHAI - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :
THROUGH JAIL for Petitioner
MS SADHANA SAGAR for Petitioner
MR PK SONI for Petitioner
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR for Respondent
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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE H.B.ANTANI

Date : 08/08/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973, is directed against

judgment dated September 14, 2001 rendered by the learned Additional Sessions Judge, Court No. 7, Ahmedabad in Sessions Case No. 268 of 1999, by which the appellant is convicted under Section 21 of the Narcotic Drugs And Psychotropic Substances Act, 1985 (*"the Act"*, for short) and sentenced to suffer R.I. for 11 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default R.I. for 1 month.

2. The facts emerging from the record of the case are as under:

On or about August 17, 1999, Mr. H.K. Chauhan, was performing duties as Police Inspector, State Narcotics Cell, C.I.D. Crime, State of Gujarat, Ahmedabad. When he was in his office on August 17, 1999, he received an information that a person, wearing shirt having White lines and Blue coloured Jeans pant, named, Haresh @ Hakalo Bachubhai Gadhavi, was to go from New Cotton Mills to Anupam Cinema, Kokhra, between 16-30 Hrs to 17-30 Hrs with Brown Sugar. On receipt of the information, Mr.Chauhan reduced the same into writing by making necessary entry in the Register maintained for this purpose at the Police Station. He, thereafter, despatched Police Constable, Mr.N.P.Makwana, to

requisition services of two *panch-witnesses.* Police Constable Mr.Makwana requisitioned services of two persons i.e. Masumbhai Munshibhai Shaikh and Mahendra Kumar Bhikabhai Patel. Both these persons expressed their willingness to act as *panch-witnesses.* Therefore, they were conveyed the information received by Mr.Chauhan. Mr.Chauhan also forwarded the report incorporating the information to his immediate superior official i.e. Superintendent of Police. The first part of the *panchnama* was drawn in the office of Mr.Chauhan, and thereafter, a raid was arranged. The members of the raiding party kept a watch on the road leading to Anupam Cinema. At about 16-45 Hrs, the person, whose description was given in the information, was spotted. He was intercepted. On being asked by PI Mr.Chauhan, the person intercepted, disclosed his name to be Haresh @ Haklo Bachubhai Gadhavi i.e. the appellant. The information, which was received by Mr.Chauhan, was conveyed to the appellant and the appellant was informed that it was necessary to search his person. Before effecting the search, Mr.Chauhan informed the appellant that he could be searched before a Magistrate or a Gazetted Officer, if so desired. However, the appellant declined the offer made by Mr.Chauhan. Therefore, the person of the appellant was searched. From the right

side pocket of his pant, a transparent plastic-bag, which was heat sealed, was found. On opening the same, it was found to be containing powder having Brown colour. The same was ascertained to be Brown Sugar by smelling. The Brown Sugar with plastic-bag was weighed and its weight was found to be 70 gms. The value of the substance found was estimated to be Rs.7,00,000/- (Rupees Seven Lakhs Only). Thereafter, 5 gms were taken out for the purpose of analysis, whereas 5 gms were taken out as 'reserved sample' for the purpose of preparing 'a reserve sample' and the rest of the quantity was kept in another plastic-bag. All the three plastic-bags were heat sealed. Each plastic-bag was wrapped in paper and on each of them, slip bearing signatures of *panch-witnesses* were pasted. Thereafter, the bag was tied with twine on which, seal bearing “PI NDPS, CID Crime, Ahmedabad” was applied. Mr.Chauhan demanded pass / permit from the appellant authorising him to possess Brown Sugar. No document could be produced by the appellant. Therefore, he was arrested and a detailed *panchnama* regarding search and seizure was drawn. Thereafter, Mr.Chauhan lodged his complaint. He handed-over the complaint, the *panchnama*, the articles seized, etc to Mr.Uttam Kumar Jadhav, who was then PSI of State Narcotics Cell. The substance seized was sent to FSL for analysis. Investigation in

the complaint lodged by Mr.Chauhan was made by Mr.Jadhav. Report from the FSL, which indicated that the substance analysed was Heroin i.e. Brown Sugar, was obtained.

3. On completion of investigation, the appellant was charge-sheeted in the Court of learned Special Judge, Ahmedabad on the basis of which, Sessions Case No. 268 of 1999 was registered against him. The learned Additional Sessions Judge, to whom the case was made over for trial, framed necessary charge against the appellant at Exh. 1. It was read over and explained to him. He pleaded not guilty to the same claimed to be tried. The prosecution, therefore, examined - (1) Mr.H.K.Chauhan, who was then PI of Narcotics Cell, as PW1, at Exh. 29; (2) *panch,* Masumbhai Munshibhai Shaikh, as PW2, at Exh. 54; (3) ASI Mr.H.L.Kapadia as PW3, at Exh.55; and (4) PSI Mr.Uttam Kumar M. Jadhav as PW4, at Exh.56, to prove its case against the appellant. The prosecution also produced documentary evidence, such as, the extract of the entry from Police Station Diary, incorporating information received by Mr.Chauhan, at Exh.30; the intimation by Mr.Chauhan, who was then PI of State Narcotics Cell, Ahmedabad, to his immediate superior official i.e. Superintendent of Police, incorporating information received by him, at Exh. 31; the Memorandum, indicating

offer made by Mr. Chauhan to search the appellant in presence of a Magistrate or a Gazetted Officer, as required by Section 50 of the Act, at Exh. 32; the Seizure Memo issued by PI to the appellant, indicating find of Brown Sugar from him, at Exh. 33; the Memorandum, indicating grounds of arrest communicated to the appellant, at Exh. 34; a detailed *panchnama* of search and seizure of Brown Sugar from the possession of the appellant, at Exh. 35; the complaint lodged by Mr.Chauhan, at Exh. 36; the entry from Police Station Diary, at Exh. 37; the intimation given by PI Mr.Chauhan to PSI Mr.U.M.Jadhav, while handing over the *muddamal* and requesting him to investigate the complaint, at Exh. 38; the Report after raid, made by PI Mr.Chauhan to Superintendent of Police, at Exh. 39; the forwarding letter with which the *muddamal* was sent to FSL at Exh. 40; the intimation given to Ms.Laxmiben, wife of the appellant, that the appellant was arrested for commission of offence punishable under the provisions of the Act, at Exh. 41; the Report made by the Investigating Officer to learned Chief Judicial Magistrate, as required under Section 102 of the Code of Criminal Procedure, 1973, at Exh. 42; the Report of the FSL, at Exh. 57, etc, in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution-witnesses and recorded his further statement, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the appellant claimed that he was a Rickshaw Driver, and with reference to a dispute relating to fare to be charged, he was picked-up from his house and a false case was foisted upon him. However, no defence evidence was led by the appellant.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that on August 17, 1999 at about 6.30 PM, the appellant was found in possession of Brown Sugar weighing 70 gms, near Anupam Cinema without pass or permit, and, therefore, commission of offence punishable under Section 21 of the Act by him was established. The learned Judge noticed that the provisions of Section 42 (2) of Section 50 of the Act were complied with by Mr.Chauhan. In view of the abovereferred to conclusions, the learned Judge has convicted the appellant under Section 21 of the Act and imposed sentences referred to earlier by judgment dated September

14, 2001, giving rise to instant appeal.

6. Ms. Sadhana Sagar, learned Counsel of the appellant, contended that the testimony of PI Mr.Chauhan would indicate that he had received the information from his informant at about 2.00 P.M., whereas evidence on record indicates that before that, he had despatched his Constable to requisition services of the *panch-witnesses* at 1.30 PM and, therefore, the case that the information was received pursuant to which raid was arranged, should have been disbelieved by the trial Court. It was argued that admittedly, no report either under Section 42 (2) or Section 57 of the Act was forwarded by Mr.Chauhan to Mr.Raiger, who was then the Head of the State Narcotics Cell, Ahmedabad and, therefore, the judgment impugned should be set aside. It was argued that in the Petrol-Book, which is normally being maintained, names of members of raiding party, etc. were not mentioned, which creates serious doubt about the prosecution-case that raid was carried out on the road near the Anupam Cinema and, therefore, the prosecution-case should be disbelieved by this Court. The learned Counsel of the appellant maintained that it is stated by Mr.Chauhan in his testimony that 5 gms of Brown Sugar was taken out from the plastic-bag found from the possession of the

appellant to be sent to FSL for analysis, but the weight of the *muddamal* received was found to be 4.637 gms, and in view of this discrepancy, which is not explained by the prosecution, the unwarranted conviction of the appellant should be set aside. It was argued that the appellant was not made aware of his right that he was entitled to be searched in presence of a Magistrate or a Gazetted Officer, and as there is breach of mandatory provisions of Section 50 of the Act, the judgment impugned should be reversed. The learned Counsel of the appellant emphasised that evidence on record has not been appreciated by the learned Judge of the trial Court in its true perspective and therefore, the appeal should be accepted.

7. Mr. K.T. Dave, learned Additional Public Prosecutor for the State, argued that Mr.Raiger, who was then the Head of State Narcotics Cell, Ahmedabad, was not immediate superior official of PI Mr.Chauhan, but Superintendent of Police, State Narcotics Cell, Ahmedabad, was his immediate superior official, and as necessary Report was forwarded by PI Mr.Chauhan to his Superintendent of Police, as required by Section 42 (2) of the Act and Section 57 of the Act, it is wrong to argue that these provisions were not complied with by the

prosecution. The learned Counsel of the State pointed out that non-mention of names of the members of the raiding party in Petrol-Book would not indicate that no information was received by PI Mr.Chauhan, as is claimed by him in his substantive evidence before the Court, or that no raid was carried out on the road leading to Anupam Cinema, and as the said fact stands firmly established by the testimony of Mr.Chauhan, which in turn stands corroborated by the testimony of Mr.Kapadia and Mr.Jadhav as well as other contemporary documents produced on record of the case, non-mention of the names of the members of the raiding party should not be regarded as having a vitiating effect on the prosecution-case. The learned Counsel of the State Government argued that what is mentioned by Mr.Chauhan in his testimony before the Court is that a sample having weight of about 5 gms was prepared for the purpose of sending the same to FSL, but the exact weight of the same was not ascertained and, therefore, the fact that the weight of the substance was mentioned to be 4.637 gms in FSL report would not indicate that there is discrepancy in weight of the *muddamal* sent, as is claimed by the learned Counsel of the appellant. Placing reliance on the decision of Full Bench of this Court in **Bhupatji Shakaraji V. State of Gujarat, 2003 (2) GLR 1127**, it was argued that the

requirement to inform the accused, whether he wants to be searched in the presence of a Gazetted Officer or a Magistrate, does not extend to informing him that he has a right in this regard and, therefore, the submission that provisions of Section 50 of the Act were not complied with, should not be upheld by this Court. The learned Counsel of the State asserted that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellant under Section 21 of the Act, and as the learned Counsel of the appellant has failed to dislodge them, the appeal, which lacks merits, should be dismissed.

8. This Court has heard Ms.Sadhana Sagar, learned Counsel of the appellant, and Mr. K.T.Dave, learned Additional Public Prosecutor, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The fact that the information was received by Mr.Chauhan that the appellant was to pass with Brown Sugar, near Anupam Cinema and, therefore, the raid was carried out, can hardly be disputed. Mr.Chauhan, in his

substantive evidence before the Court, has stated that when he was in his office, he had received the information that a person, Haresh alias Hakalo, wearing a shirt having white lines and Blue coloured Jeans pant, was to go towards Anupam Cinema from the direction of New Cotton Mills with Brown Sugar between 16-30 Hrs and 17-30 Hrs on August 17, 1999. He has asserted that on receiving the information, he had reduced the same into writing and made necessary entry in the Register. The witness stands completely corroborated by contemporary document i.e. Exh. 30, which is an entry from the Police Station Diary, maintained at the Police Station. A bare perusal of Exh. 30 makes it very clear that information received is incorporated therein. The witness has further stated that on receipt of the information, necessary report was made by him to his immediate superior official i.e. Superintendent of Police. With reference to this assertion also, the Court finds that he is amply corroborated by contemporary document on record, namely, the Report produced at Exh. 31. According to this witness, on receipt of the information, services of *panch-witnesses* were requisitioned and a raid was arranged. The witness has stated that at about 16-45 Hrs, the person, whose description was given in the information, was spotted and was intercepted. According

to Mr.Chauhan, the person intercepted was the appellant. Mr.Chauhan has further stated before the Court that after introducing himself, he had offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer, but the offer made by him was declined by the appellant. It is categorically stated by Mr.Chauhan that thereafter, the person of the appellant was searched in presence of *panch-witnesses*, which resulted into find of a plastic-bag containing Brown Sugar from the right-side of pocket of his pant. Though this witness has been cross-examined searchingly at length by two different Advocates, who were engaged by the appellant at the stage of trial, nothing substantial could be elicited so as to impeach the credibility of this witness. The witness stands fully corroborated by contemporary document, namely, detailed *panchnama*, Exh. 35, which was drawn at the place where the appellant was intercepted. The evidence on record establishes that person of the appellant was searched and Brown Sugar was seized from his possession. Mr.Chauhan also stands fully corroborated by testimony of ASI Mr.Kapadia, recorded at Exh. 55, and that of Investigating Officer PSI Mr.Jadhav, recorded at Exh. 56.

10. The plea that the Report, as required by Section 42

(2) of the Act and Section 57, was not forwarded to Mr.Raiger, who was then the Head of Narcotics Cell, CID Crime, State of Gujarat, Ahmedabad, and, therefore, the appellant should be acquitted in view of breach of mandatory provisions of the Act committed by the prosecution, is devoid of merits. It is an admitted position that Mr.Raiger was Head of the State Narcotics Cell, CID Crime, State of Gujarat, Ahmedabad. However, he was not immediate superior official, as contemplated by Section 42 (2) of the Act. The phrase 'immediate official superior' occurring in Section 42 (2) of the Act cannot be construed to mean head of the department. Such an interpretation by a Court would amount to rewriting provisions of Section 42 (2) of the Act, which is not permissible. The immediate superior official of PI Mr.Chauhan was Superintendent of Police, and therefore, as required by law, Mr.Chauhan had forwarded necessary Reports under Section 42 (2) and Section 57 of the Act to his Superintendent of Police. These reports are to be found on the record of the case at Exhs. 31 and 39. On the facts and in the circumstances of the case, this Court is of the view that the appellant has failed to point out to the Court as to in which manner the provisions of Section 42 (2) and Section 57 of the Act were contravened. Therefore, the plea, regarding non-

compliance of Section 42 (2) and Section 57, cannot be upheld and is hereby rejected.

11. The contention that the appellant was not made aware of his right to be searched in presence of a Magistrate or a Gazetted Officer and, therefore, there is breach of provisions of Section 50 of the Act, has no substance at all. The record of the case and more particularly, reliable testimony of PI Mr.Chauhan, makes it very clear that before effecting search of person of the appellant, he was offered to be searched in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the the appellant. This fact is also mentioned in the *panchnama* which was drawn immediately after seizure was over. The fact that offer as contemplated by Section 50 of the Act was made to the appellant also stands proved by contents of memorandum prepared for this very purpose, which is produced at Exh. 32. The fact that the offer, as contemplated by Section 50, was made to the appellant and that the said offer was declined by the appellant, is also mentioned in the complaint, which was lodged without loss of time. Further, ASI Mr.Kapadia, who was one of the members of the raiding party, has also stated in his testimony recorded at Exh. 55, that it was offered by Mr.Chauhan to the appellant that he could be searched in

presence of a Magistrate or a Gazetted Officer, if so desired and that the said offer was declined by the appellant. Though Mr.Kapadia has been cross-examined at length, nothing could be brought on record, which would raise doubt about his assertion that the offer, as contemplated by Section 50 of the Act, was made by PI Mr.Chauhan to the appellant. Thus, there is no manner of doubt that the offer, as required by Section 50 of the Act, was made by Mr.Chauhan to the appellant.

However, what is argued by the learned Counsel of the appellant is that it was obligatory for PI Mr.Chauhan to inform the appellant that he had a right to be searched in presence of a Magistrate or a Gazetted Officer, and as the appellant was not made aware of his right, it should be held that provisions of Section 50 of the Act were not complied with. This very question has been examined by the Full Bench of this Court in **Bhupatji Shakaraji V. State of Gujarat *(supra)*** and is negatived by making following pertinent observations in paragraph-13 of the reported decision:

> *"It may be noticed here that a Larger Bench of the Supreme Court in Joseph Fernandez v. State of Goa, reported in AIR 2000 SC 3502, negatived the contention that the authorised officer should have told the person who was subjected to search that he had a right to be searched, holding that the communication to the accused that if he wished, he could be searched in the*

> *presence of a Gazetted Officer or a Magistrate, was an offer which was communication of the information that the accused has a right to be searched. It was held that informing the accused that, "If you wish you may be searched in the presence of Gazetted Officer or a Magistrate" cannot be said to be non-compliance with the mandatory provisions contained in Sec.50 of the Act. The binding effect of this view of the Larger Bench in Joseph Fernandez (supra) decided on 5-10-1999 would not be affected by the observations in Paragraph 6 of the judgment in K. Mohanan v. State of Kerala, reported in 2000 (10) SCC 222 on which reliance was sought to be place on behalf of the appellant."*

In view of authoritative pronouncement of law on the point by Full Bench of this Court based on the decision of the Supreme Court, the plea that there is breach of provisions of Section 50 of the Act, because PI Mr.Chauhan had failed to convey the appellant about his right to be searched in presence of a Magistrate or a Gazetted Officer, cannot be upheld and is hereby rejected.

12. The contention that there is discrepancy regarding weight of the *muddamal,* as mentioned by PI Mr.Chauhan and as mentioned in Report of the FSL, and, therefore, the appellant should be acquitted, is merely stated to be rejected. A bare reading of the testimony of PI Mr.Chauhan makes it very clear that he has mentioned in his testimony that substance weighing about 5 gms, was taken out of the plastic bag containing Brown Sugar found

from the possession of the appellant, for the purpose of sending the same to FSL for analysis. The exact weight is not stated by him at all. Further, the weight mentioned by him was with plastic bag, whereas the weight of substance mentioned in the Report of FSL is without plastic bag. Under the circumstances, slight discrepancy found in weight is understandable. Thus, the appellant is not entitled to any relief on the basis of so called discrepancy in weight of the *muddamal* seized and sent to FSL for analysis.

Similarly, non-mention of names of the members of raiding party in Petrol Book has no adverse effect on the prosecution-case. The fact that the raid was arranged and carried out stands amply proved by the testimony of PI Mr.Chauhan, ASI Mr.Kapadia as well as several contemporary documents produced on the record of the case. The law does not require that in order to prove the fact that a raid was arranged under the Act, pursuant to receipt of secret information, names of those who participated in raid must be reflected in the Petrol-Book. Non-mention of names of the members of the raiding party in the Petrol Book, at the best, can point out some irregularity on the part of officers, who are expected to maintain it properly. However, omission to maintain

Petrol-Book properly cannot have a vitiating effect on the prosecution-case. Thus, the appellant is not entitled to any benefit on the grounds that names of the members of the raiding party were not mentioned in the Petrol Book. Except the points which are dealt with, no other point is urged in support of the appeal for consideration of Court and, therefore, the conviction of the appellant under Section 21 of the Act will have to be upheld.

13. Coming to the question of sentence, it was argued by the learned Counsel of the appellant that the appellant is suffering from Cancer and liver problem and, therefore, the sentence imposed on the appellant should be suitably reduced. On the request being made by the Court, necessary inquiries were made by the learned Additional Public Prosecutor, and the learned Additional Public Prosecutor has informed the Court that the appellant is not suffering from Cancer, but is suffering from T.B. and for treatment of the same, he has been removed to Jamnagar District Jail.

The fact that the appellant is suffering from T.B. deserves consideration. Section 21 prescribes that the punishment to be imposed, in case a person is found to be

in possession of manufactured drug without pass or permit, shall not be less than R.I. for 10 years. On going through the impugned judgment, this Court finds that no specific reasons have been assigned by the learned Judge for the purpose of imposing R.I. for 11 years. In fact, it was pointed out by the appellant to the trial Court that he was expected to maintain his children and old parents and, therefore, should be visited with minimum punishment. His assertion that it was his liability to maintain his children and his old parents, was not demonstrated to be false. Though the appellant was found in possession of 70 gms of Brown Sugar and extensive investigation was made, it could not be established that he was a part of systematic activity dealing in Brown Sugar or that he was to sell the same to others. On the facts and in the circumstances of the case, this Court is of the view that interest of justice would be served if punishment imposed on the appellant is reduced to minimum punishment prescribed under Section 21 of the Act.

14. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant, under Section 21 of the N.D.P.S. Act, 1985, as recorded by the learned Additional Sessions Judges, Court No. 7, Ahmedabad *vide*

judgment dated September 14, 2001 rendered in Sessions Case No. 268 of 1999, is hereby confirmed. The sentence imposed on him is hereby modified and reduced. For commission of offence punishable under Section 21 of the N.D.P.S. Act, 1985, the appellant is sentenced to RI for 10 years and fine of Rs.1,00,000/- (Rupees One Lakh Only), in default RI for 1 month. The appeal is partly allowed only with reference to reduction of substantive sentence imposed on the appellant, as indicated hereinabove. The *muddamal* be disposed of in terms of the directions issued by the learned Judge of the trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath